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COURT OF CRIMINAL APPEALS
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Case No.: PD-0034-21

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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals of the State of Texas

CORNELL WITCHER, III,
APPELLANT/RESPONDENT

v.

THE STATE OF TEXAS,
APPELLEE/PETITIONER.

On discretionary review from the Sixth Court of Appeals in cause number 06-20-00040-CR; Direct Appeal from the trial court in cause number 18F1367-202, 202nd Judicial District Court, The Honorable John Tidwell, presiding.

Cornell Witcher's Response Brief

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1. IDENTITY OF PARTIES, COUNSEL, AND JUDGES

In accord with Rule 38.1 of the Texas Rules of Appellate Procedure, Appellant provides this Court with this complete list of all interested parties.

Appellate Court:	SIXTH COURT OF APPEALS OF THE STATE OF TEXAS
Appellate Justices:	CHIEF JUSTICE JOSH R. MORRISS, III JUSTICE SCOTT E. STEVENS JUSTICE RALPH K. BURGESS (AUTHORING JUSTICE)
Trial Court:	202ND JUDICIAL DISTRICT COURT, BOWIE COUNTY, TEXAS
Trial Court Judge:	THE HONORABLE JOHN L. TIDWELL
Appellant:	CORNELL WITCHER, III
Trial Attorneys:	**Mr. Clayton Hass** TBA: 24101844 **Ms. Amanda Gunn** TBA: 24106901 **Mr. Rick C. Shumaker** TBA: 18325300 424 W. Broad Street Texarkana, Texas, 75501
Appellate Counsel:	**Niles Illich** TBA: 24069969 Scott H. Palmer, P.C. 15455 Dallas Parkway, Suite 540 Addison, Texas 75001
Appellee:	THE STATE OF TEXAS

Trial/Appellate Counsel:	The State of Texas/Bowie County District Attorney's Office **Jerry Rochelle** **Kelley Crisp** **Lauren Richards** **Randle Smolarz** Bowie County District Attorney's Office 424 W. Broad Street Texarkana, Texas 75501 **Stacy M. Soule** **John R. Messinger** Office of the State Prosecuting Attorney P.O. Box 13046 Austin, Texas 78711

2. CITATION TO THE RECORD

The reporter's record is cited to as: [10 RR 23] this hypothetical citation would be to volume 10, page 23. The clerk's record is cited to as: [CR 23] this hypothetical citation would be to page 23 of the one volume clerk's record.

3. STATEMENT CONCERNING ORAL ARGUMENT

The state did not request oral argument, nor did this Court grant it.

4. TABLE OF CONTENTS

TABLE OF CONTENTS

5. TABLE OF AUTHORITIES

CASES

RULES

CODES

CONSTITUTIONAL PROVISIONS

Case No. PD-0034-21

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

CORNELL LADELL WITCHER, III,
APPELLANT

v.

THE STATE OF TEXAS,
APPELLEE.

To the Honorable Judges of the Court of Criminal Appeals:

Cornell Witcher, III, Appellant, presents this Response Brief.

6. STATEMENT OF THE CASE

The State of Texas charged Appellant with Continuous Sexual Abuse of a Child. Tex. Penal Code Ann. § 21.02(b) (West 2011). [CR 19]. The case went to trial in the 202nd Judicial District Court. A jury found Appellant guilty and sentenced him to spend the remainder of his life in the custody of the Texas Department of Criminal Justice. [CR 113]. Appellant appealed. A unanimous panel from the Sixth Court of Appeals reversed the judgment. *Witcher v. State*, 06-20-00040-CR, 2020

WL 7483953, at *1 (Tex. App.—Texarkana Dec. 21, 2020, pet. granted). The SPA filed a petition for discretionary review and this Court granted that petition.

7. WITCHER'S RESPONSE TO SPA'S ISSUE PRESENTED

> The sanctity of the jury is undisputed. But this Court's precedent is clear; a jury must render a verdict based on the evidence. A jury is not free to theorize or guess and speculation is not evidence. Justice Burgess recognized that the state is not required to prove the exact dates of the sexual assault, but rightly concluded that the evidence of when the abuse began was insufficient. Due to this deficiency, the appellate court reversed the verdict and remanded for a new trial. Did Justice Burgess and the unanimous panel err?

8. STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED

Mary Watson[1] was born in 2008.[2] [State's Ex. 1, page 1]. Around July 26, 2018, Watson told her older sister that Witcher had been having intercourse with her.[3] [19 RR 22]. In 2018, Watson was ten and then eleven years old. [State's Ex. 1, page 1]. Watson had unspecified learning difficulties. [19 RR 33].

Witcher was a friend of Watson's family and had known most of the family members for more than a decade. [19 RR 31]. Witcher lived with Watson's family in 2018. [19 RR 31]. Witcher moved into Watson's family's home around the time that Watson's brother, Dayday, went to jail. [19 RR 80-81]. When Dayday went to jail, Watson moved into Dayday's room. [19 RR 81].

Watson claimed Witcher had "been messing with her." [19 RR 23]. Watson claimed that this occurred "a lot." [19 RR 24]. Watson's sister told her family members and they confronted Witcher. Witcher appeared "shocked," and he left the

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[1] The district court used the pseudonym of Mary Watson to refer to the complaining witness. The use of the pseudonym comports with Rule 9.8(a) of the Texas Rules of Appellate Procedure and so will be used here. Tex. R. App. P. 9.8(a).

[2] The specific date is available in State's Exhibit One. But to protect personally identifying information, this brief will just identify the year of Watson's birth. The specific month and day are not generally relevant to this appeal.

[3] In the interest of expediency, counsel for Appellant treats these assaults as though they occurred. Counsel for Appellant does not know whether the assaults occurred. Appellant was convicted of the assaults, but the conviction was vacated. Nothing in this brief should be read as an admission. The argument presented here does not turn on whether the assaults existed, but rather asks if they existed did the evidence establish when the assaults occurred? Thus, in the interest of expediency only, counsel for Appellant assumes the assaults occurred. But this should not be read as an admission by Appellant.

home that night without even taking his personal items, instead "[h]e just left." [19 RR 36].

Watson testified that Witcher assaulted her more than ten times. [19 RR 82-84].

Watson testified that Witcher "started coming into the room and doing those things to [her]" "[w]hen [her] brother went to jail." [19 RR 84]. And Watson testified that Witcher "stopped" when Watson told her sister about the assaults. [19 RR 86].

After Watson's family learned of the assaults, they took her to Wadley, a medical facility. [State's Ex. 1]. The history of the assault in the medical record reads:

> Pt stated that Cornell [Witcher] has been coming into her brothers room (where she has been sleeping while her brother is away) at night when she is asleep and after her mom goes to work. He takes her 'Mickey Mouse pajamas off' and puts his 'middle parts' inside of her. Patient becomes tearful and tells me that 'it hurts.' . . . When questioned how many times he has put his 'middle parts in (her)' she states 'a bunch of times.' 'He comes by my brothers room all the time.' Child states that Cornell is her sisters boyfriend and stays at their house.

[State's Ex. 1, page 2].

All of the evidence concerning the dates of the allegations are that the assaults occurred sometime between June 10, 2018 and July 28, 2018.

The attorney for the state asked Watson's sister about the time frame of the assaults, but the response was non-committal and uncertain. [19 RR 20-21].

Eventually the attorney for the state started to ask questions that indicated the uncertainty about the dates. [19 RR 22].

Testimony from the nurse indicated that the last assault occurred the night before Watson met with the nurse, which was presumably July 28, 2018. [19 CR 47; state's Ex. 1, dated July 28, 2020].

Watson testified similarly. [19 RR 81]. She testified that the assaults started when her brother went to jail, but she did not provide a specific date. [19 RR 81; 84; 86]. Three times the attorney for the state asked Watson about when the assaults started and three times Watson's answer remained the same, "when Dayday went to jail." [19 RR 81; 84; 86].

The investigator for the district attorney's office testified that the indictment covered conduct from June 10, 2018 through July 28, 2018 and that the testimony in the courtroom was that the abuse started in June when Dayday went to jail. [19 RR 89]. The investigator then testified that he confirmed Dayday went to jail "around that time in 2008." (Emphasis added). [19 RR 89]. But this was a misstatement because Watson was not born until 2008 and the investigator promptly clarified his testimony to indicate that the assaults began sometime in June 2018. [State's Ex. 1; 19 RR 90].

The parties rested and the trial court prepared its charge. The charge read, in relevant part:

> A person commits the offense of Continuous Sexual Abuse of a Child if during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age.
>
> . . .
>
> . . . you are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. However, in order to find the defendant guilty of the offense of Continuous Sexual Abuse of a Child, you must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse. (Emphasis added).

[CR 90; 91].

The jury convicted Appellant of Continuous Sexual Assault of a Child and sentenced him to spend the remainder of his life in the custody of the Texas Department of Criminal Justice.

Appellant appealed and challenged the sufficiency of the evidence. *Witcher*, 2020 WL 7483953, at *1. Justice Burgess and the unanimous Sixth Court of Appeals agreed. *Id*. at *5. Justice Burgess explained:

> . . . testimony regarding when the abuse began is sparse and ambiguous. Mary testified that it began when her brother went to jail. At trial, the state did not establish the precise date on which her brother went to jail,4 and on appeal, the state does not explain how this testimony

> establishes that date. And the evidence in this case only vaguely references a time span during which her brother could have gone to jail. Thompson testified that his investigation showed that Darren was arrested and incarcerated 'around' the period between June 10 and July 28, 2018. Erin agreed that Darren went to jail 'in about June of– maybe June 10th, give or take.' The words 'at some point,' 'around,' 'about,' 'maybe,' and 'give or take' make the date more uncertain, not less. Thus, the jury could only have speculated from this testimony that Mary's brother went to jail on June 10.

Id. at *4.

The Court of Appeals correctly recognized that the evidence did not establish when the first assault occurred and, that due to the comparatively short window in which these assaults occurred, that the evidence was insufficient to find that the assaults occurred over a period of thirty days or more. But Mr. Witcher is not "off the hook;" on remand he must stand trial for a first-degree felony.

The SPA filed a petition for discretionary review and this appeal follows.

8. SUMMARY OF THE ARGUMENT

SPA would like this case to be a case about a manufactured ambiguity in the word "when." But neither Appellant nor the Sixth Court of Appeals argued that this case concerns uncertainty in the meaning of the word "when." Rather, as the unanimous panel of the Sixth Court of Appeals recognized, this is a case about the absence of evidence. Specifically, this case is about the absence of evidence of when sexual assaults began. While the state did not have to prove specifically when the assaults occurred, the state,—in selecting the charge—assumed the burden of proving that the assaults occurred over a period of thirty days or more. On direct appeal, counsel for Appellant established that the evidence was legally insufficient to show that the assaults occurred over a period of thirty days or more. The evidence established a date when the last assault occurred, but did not establish a date when the first assault occurred. Instead the evidence was that the first assault occurred "when Dayday went to jail." The state did not produce records of when Dayday when to jail and no witness testified to the date. This was a curious omission by the state because, presumably, they have records of when Dayday went to jail and simply decided not to introduce them as evidence. Thus, as Justice Burgess and the unanimous panel of the Sixth Court of Appeals recognized, this is a case about the absence of evidence not a manufactured ambiguity.

9. ARGUMENT

I. SPA's Issue on Appeal

SPA's argument misrepresents Justice Burgess's opinion and the opinion of the unanimous panel. SPA's argument posits universally accepted truths about the primacy of the jury system and the deference owed to it. But the argument does not squarely address the panel's assessment of the evidence presented to the jury.

SPA's argument concludes with a clever rhetorical trick devoted to the word "salt," but the reasoning does not apply. This case is not about uncertainty in the meaning of a word, but instead about a lack of evidence of when the sexual assaults began. This is not the equivalent of a dispute about the meaning of the word "salt," but is instead closer to a question about when the World Series will be played. Because the date of the World Series is contingent on when the American and National League Championships are over (each is a best-of-seven series) and these generally end sometime in early October, we can say that the World Series will likely be played sometime in October, but there is no ability to determine exactly when. The state, however, wrongly characterizes appellant's argument as one about ambiguity of language instead of recognizing the argument as one about the absence of evidence.

The unanimous panel for the Sixth Court of Appeals recognized the argument and reached the right conclusion. The evidence did not establish when the sexual

assaults began. Because the testimony was too uncertain to identify when the sexual assaults began, and because the sexual assaults did not occur over a long period of time, the evidence was insufficient to establish that the assaults occurred over thirty or more days, as required by statute. Therefore Justice Burgess and the unanimous panel for the Sixth Court of Appeals reached the right conclusion.

II. Law

A. Definition of Inference and Speculation

The resolution of the question facing this Court turns largely on the distinction between an inference and speculation.

In *Hooper,* this Court defined an inference as "a conclusion reached by considering other facts and deducing a logical consequence from them." And, in *Hooper*, this Court has defined speculation as "mere theorizing or guessing about the possible meaning of facts and evidence presented." *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007).

B. Standard of Review and Legal Sufficiency and Applicable Case

This Court reviews the legal sufficiency of the evidence by considering all of the evidence produced at trial—in the light most favorable to the verdict—to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Nelson v. State*, 405 S.W.3d 113, 122 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (citing *Williams v. State*, 235

S.W.3d 742, 750 (Tex. Crim. App. 2007)) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89, 61 L. Ed. 2d 560 (1979)). In conducting a legal-sufficiency analysis, this Court's role is to provide a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *Id.* (citing *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988)). In doing so, this Court gives deference to the responsibility of the fact-finder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Id.* This Court defers to the fact-finder's resolution of conflicting evidence unless the resolution is not rational. *Id.* (citing *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)). However, this Court's duty requires it to "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense for which he was accused. *Id.*

Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper*, 214 S.W.3d at 13. An inference, including one from circumstantial evidence, is a conclusion reached by considering other facts and deducing a logical consequence from them. *Id.* at 16. On the other hand, speculating is mere theorizing or guessing about the possible meaning of the facts and evidence presented. *Id.* A conclusion that has been reached by speculation may not be completely

unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. *Id.*

In *Adames*, the Court explained that in a federal due process evidentiary sufficiency review, a reviewing court must view all of the evidence—and not just the evidence that supports the verdict. *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011). This evidence is viewed in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

The Court explained in *Hooper* that in making a legal-sufficiency determination,

> juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. To correctly apply the *Jackson* standard, it is vital that courts of appeals understand the difference between a reasonable inference supported by the evidence at trial, speculation, and a presumption. A presumption is a legal inference that a fact exists if the facts giving rise to the presumption are proven beyond a reasonable doubt. For example, the Penal Code states that a person who purchases or receives a used or secondhand motor vehicle is presumed to know on receipt that the vehicle has been previously stolen, if certain basic facts are established regarding his conduct after receiving the vehicle. A jury may find that the element of the offense sought to be presumed exists, but it is not bound to find so. In contrast, an inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. (emphasis added).

Hooper, 214 S.W.3d at 15–16.

The Court continued:

> Without concrete examples, it can be difficult to differentiate between inferences and speculation, and between drawing multiple reasonable inferences versus drawing a series of factually unsupported speculations. This hypothetical might help clarify the difference. A woman is seen standing in an office holding a smoking gun. There is a body with a gunshot wound on the floor near her. Based on these two facts, it is reasonable to infer that the woman shot the gun (she is holding the gun, and it is still smoking). Is it also reasonable to infer that she shot the person on the floor? To make that determination, other factors must be taken into consideration. If she is the only person in the room with a smoking gun, then it is reasonable to infer that she shot the person on the floor. But, if there are other people with smoking guns in the room, absent other evidence of her guilt, it is not reasonable to infer that she was the shooter. No rational juror should find beyond a reasonable doubt that she was the shooter, rather than any of the other people with smoking guns. To do so would require impermissible speculation. But, what if there is also evidence that the other guns in the room are toy guns and cannot shoot bullets? Then, it would be reasonable to infer that no one with a toy gun was the shooter. It would also be reasonable to infer that the woman holding the smoking gun was the shooter. This would require multiple inferences based upon the same set of facts, but they are reasonable inferences when looking at the evidence. We first have to infer that she shot the gun. This is a reasonable inference because she is holding the gun, and it is still smoking. Next, we have to infer that she shot the person on the floor. This inference is based in part on the original inference that she shot the gun, but is also a reasonable inference drawn from the circumstances. (emphasis added).

Id. at 16.

This Court measures the sufficiency of the evidence against the elements of the offense as defined by the hypothetically correct jury charge for the case. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

In *Griffith*, a 2019 unpublished case from this Court, the Court considered an argument similar to the one presented here. *Griffith v. State*, PD-0639-18, 2019 WL 1486926, at *1 (Tex. Crim. App. Apr. 3, 2019). The intermediate-appellate court affirmed the trial court's verdict, but this Court reversed because the evidence was insufficient to show a second assault before the victim's fourteenth birthday. *Id*. The Court reformed the judgment to reflect a conviction for first-degree Aggravated Sexual Assault of a Child. *Id*. at *15.

In *Griffith*, Judge Hervey explained why the evidence was insufficient to support the verdict. Judge Hervey wrote:

> Part of the problem with the dates in this case is a disconnect between the case that the state believed that it could prove, and the evidence that it presented to the jury. The state believed that it could show that the first of the Frost incidents occurred before A.G.'s birthday on April 4, 2013. There were lengthy pretrial arguments about the timeline presented by the state, but that evidence was never presented to the jury. At the pretrial outcry hearing, Bailey testified that the victim told her about four incidents. The first was the Dawson incident in 2012. The second incident occurred in the house in Frost. The third time happened six or seven months after the second time, and the fourth time happened 'a couple of weeks' after the third time. A.G. also told Bailey that the fourth incident was three weeks before the December 30 interview. Bailey testified that A.G. used the term 'a couple of weeks' in a conversational manner, and did not necessarily mean a literal two week period. The state clarified that the fourth assault happened between Thanksgiving and Christmas. The victim did not use any holidays or events to set a date for the third assault, but she did say that it happened when she was being home schooled and it was 'hot outside.'

> Using these time periods, the state attempted to count back from the date of the forensic interview. The state's theory was that the fourth assault happened in early December or late November. 'A couple of weeks' earlier would put the third incident in mid-November, but the prosecutor took the 'couple of weeks' comment and seemed to stretch that time, arguing that the third incident took place in October or even September—as much as eight weeks before the fourth incident—because other evidence showed that A.G. was being home schooled and that it was 'hot outside' at the time. Based on this interpretation, and counting back another six or seven months from September, the prosecutor put the second incident in February or March. This would have been before A.G.'s fourteenth birthday in April. The state's proposed timeline was fiercely contested at the pretrial hearing, with the defense accusing the state of 'messing' with the dates to try and place the second incident before A.G.'s fourteenth birthday. The state's timeline at the pretrial outcry hearing was plausible, and the jury might have used these dates to reasonably infer that the second assault occurred before A.G.'s fourteenth birthday, but the problem is that none of this evidence was presented to the jury. A jury cannot make inferences based on evidence that they never heard.

Id. at *5.

This Court correctly determined that the evidence was insufficient to support the verdict, reformed the conviction to reflect a conviction for the lesser-included offense of first-degree Aggravated Sexual Assault of a Child and remanded for a new sentencing hearing. *Id*. at *5.

C. Elements of Hypothetically Correct Charge

To establish the offense of Continuous Sexual Abuse of a Child, the state had to prove: (1) Appellant committed two or more acts of sexual abuse, (2) during a

period that is 30 or more days in duration, and (3) at the time of the commission of each of the acts of sexual abuse, the defendant was 17 years of age or older and the victim was a child younger than 14 years of age. *Williams v. State*, 305 S.W.3d 886, 889 (Tex. App.—Texarkana 2010, no pet.).

III. Facts

Watson was born in 2008. [State's Ex. 1, page 1]. Around July 26, 2018, Watson told her older sister that Witcher had been having intercourse with her. [19 RR 22]. In 2018, Watson was ten or eleven years old. [State's Ex. 1, page 1]. Watson had unspecified learning difficulties. [19 RR 33].

Watson told her sister that Witcher had "been messing with her" and that it happened "a lot." [19 RR 23; 24].

Watson testified that Witcher "started coming into the room and doing those things to [her]" "[w]hen [her] brother went to jail." [19 RR 84]. And Watson testified that Witcher "stopped" when Watson told her sister about the assaults. [19 RR 86].

All of the evidence concerning the dates of the allegations are that the assaults occurred sometime between June 10, 2018 and July 28, 2018.

The history of the assault in the medical record provides no specific information about when the assaults occurred. [State's Ex. 1, page 2].

The attorney for the state asked Watson's sister about the time frame but the response was non-committal and uncertain. [19 RR 20-21; 22].

Testimony from the nurse indicated that the last assault occurred on July 26, 2018. [19 CR 47; state's Ex. 1, dated July 28, 2020].

Watson testified similarly. [19 RR 81]. She testified that the assaults started when her brother went to jail, but she did not provide a specific date. [19 RR 81; 84; 86]. The attorney for the state asked Watson the question about when the assaults started three times and Watson's answer remained the same, "when Dayday went to jail." [19 RR 81; 84; 86].

The investigator for the district attorney's office testified that the indictment covered conduct from June 10, 2018 through July 28, 2018 and that the testimony in the courtroom was that the abuse started in June when Dayday went to jail. [19 RR 89]. The investigator then testified that he confirmed Dayday went to jail "around that time in 2008." (Emphasis added). [19 RR 89]. But this was a misstatement because Watson was not born until 2008 and the investigator promptly clarified his testimony to indicate that the assaults began sometime in June 2018. [State's Ex. 1; 19 RR 90].

The parties rested and the trial court prepared its charge. The charge read, in relevant part:

> A person commits the offense of Continuous Sexual Abuse of a Child if during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and at the time of the commission of each of the acts of sexual abuse, the actor

> is 17 years of age or older and the victim is a child younger than 14 years of age.
>
> . . .
>
> . . . you are not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed. However, in order to find the defendant guilty of the offense of Continuous Sexual Abuse of a Child, you must agree unanimously that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse.
>
> [CR 90; 91].

The jury convicted Appellant of Continuous Sexual Assault of a Child and sentenced him to spend the remainder of his life in the custody of the Texas Department of Criminal Justice.

IV. Application of Law to Fact

A. The Evidence was Insufficient

The state had the burden to show that (1) Appellant committed two or more acts of sexual abuse, (2) during a period that is 30 or more days in duration, and (3) at the time of the commission of each of the acts of sexual abuse, the defendant was 17 years of age or older and the victim was a child younger than 14 years of age. *Williams*, 305 S.W.3d at 889.

All parties agree that the evidence supports a finding that more than one assault occurred. [19 RR 23; 24]. And all parties agree that the evidence supports a

finding that the assaults occurred before Watson's fourteenth birthday. [State's Ex. 1, page 2].

The essence of the existing disagreement is whether the assaults occurred over a period of thirty days or more. In other words, if we know that the last assault occurred on July 26, 2018, did the evidence allow a conclusive determination that there was at least one assault prior to June 26, 2018? As the Sixth Court of Appeals concluded, the answer must be "no."

The evidence is insufficient to find that there was at least one assault before June 26, 2018 because the only temporal reference to when the first assault occurred was that it occurred after Dayday went to jail. [19 RR 20-21, 2, 47, 82, 84, 86, 89, 90]. But there was no specific or even general evidence of *when* in June Dayday went to jail. [19 RR 20-21, 2, 47, 82, 84, 86, 89, 90]. Perplexingly, the exhibits do not include any records for Dayday's arrest or detention. [State's Ex., generally].

Because there is no direct or even circumstantial evidence of specifically when the first assault occurred, the only way for the verdict to stand is for some conglomeration of indirect evidence to allow for an inference that the first assault occurred sometime before June 26, 2018 (this case does not involve a legal presumption).

This Court has defined an inference as "a conclusion reached by considering other facts and deducing a logical consequence from them." *Hooper*, 214 S.W.3d

at 15–16. And the Court has defined speculation as "mere theorizing or guessing about the possible meaning of facts and evidence presented." *Id.*

This Court's hypothetical example from *Hooper* is instructive in applying these definitions. In this hypothetical, the Court posited that:

> A woman is seen standing in an office holding a smoking gun. There is a body with a gunshot wound on the floor near her. Based on these two facts, it is reasonable to infer that the woman shot the gun (she is holding the gun, and it is still smoking). Is it also reasonable to infer that she shot the person on the floor? To make that determination, other factors must be taken into consideration. If she is the only person in the room with a smoking gun, then it is reasonable to infer that she shot the person on the floor. But, if there are other people with smoking guns in the room, absent other evidence of her guilt, it is not reasonable to infer that she was the shooter. No rational juror should find beyond a reasonable doubt that she was the shooter, rather than any of the other people with smoking guns. To do so would require impermissible speculation. But, what if there is also evidence that the other guns in the room are toy guns and cannot shoot bullets? Then, it would be reasonable to infer that no one with a toy gun was the shooter. It would also be reasonable to infer that the woman holding the smoking gun was the shooter. This would require multiple inferences based upon the same set of facts, but they are reasonable inferences when looking at the evidence. We first have to infer that she shot the gun. This is a reasonable inference because she is holding the gun, and it is still smoking. Next, we have to infer that she shot the person on the floor. This inference is based in part on the original inference that she shot the gun, but is also a reasonable inference drawn from the circumstances. (emphasis added).

Id. at 16.

Here, the jury could rightly conclude that the last assault occurred on July 26, 2018 because the medical exam was on July 28, 2018 and the nurse testified that the

last assault occurred "the night before last [i.e. July 26, 2018]." [19 RR 47]. But there is no evidence that there was an assault that occurred before June 26, 2018.

An inferential conclusion that the first assault occurred on or before June 26, 2018 and not one day later is not well founded and is equivalent to the hypothetical in *Hooper*, where the Court wrote:

> A woman is seen standing in an office holding a smoking gun. There is a body with a gunshot wound on the floor near her.. . . If she is the only person in the room with a smoking gun, then it is reasonable to infer that she shot the person on the floor. But, if there are other people with smoking guns in the room, absent other evidence of her guilt, it is not reasonable to infer that she was the shooter. No rational juror should find beyond a reasonable doubt that she was the shooter, rather than any of the other people with smoking guns. To do so would require impermissible speculation. (emphasis added).

Id.

Here, the possibility that the first assault occurred sometime before June 26, 2018 is the logical equivalent of the "other people with smoking guns in the room" from the Court's hypothetical. *Id*. Absent additional evidence (such as, in *Hooper*, that "the other guns in the room are toy guns and cannot shoot bullets") of when the first assault occurred, "[n]o rational juror should find beyond a reasonable doubt that [the first assault occurred on or before June 26, 2018]. To do so would require impermissible speculation." *Id.*

The "additional evidence" of when the first assault occurred is:

- Watson told her sister that Witcher had "been messing with her" and that it happened "a lot." [19 RR 23; 24].

- Watson testified that Witcher "started coming into the room and doing those things to [her]" "[w]hen [her] brother went to jail." [19 RR 84]. And Watson testified that Witcher "stopped" when Watson told her sister about the assaults. [19 RR 86].

- The clinical history of the assault in the medical record establishes that the assaults occurred before July 28, 2018. [State's Ex. 1, page 2].

- The attorney for the state asked Watson's sister about the time frame but the response was non-committal and uncertain. [19 RR 20-21]. Eventually the attorney for the state asked, "Okay. And so this night, you finally—and this is, oh, maybe June 26, give or take, of 2018—July excuse me." (emphasis added). [19 RR 22].

- Testimony from the nurse indicated that the last assault occurred the night before Watson met with the nurse, which was presumably July 28, 2018. [19 CR 47; state's Ex. 1, dated July 28, 2020].

- Watson testified that the assaults started when her brother went to jail, but she did not provide a specific date. [19 RR 81; 84; 86]. The attorney for the state asked Watson the question about when the assaults started three times and Watson's answer remained the same, "when Dayday went to jail." [19 RR 81; 84; 86]; and,

- The investigator for the district attorney's office testified that the indictment covered conduct from June 10, 2018 through July 28, 2018 and that the testimony in the courtroom was that the abuse started in June when Dayday went to jail. [19 RR 89]. The investigator then testified that he confirmed Dayday went to jail "around that time in 2008." (Emphasis added). [19 RR 89]. But this was a misstatement because Watson was not born until 2008 and the investigator promptly clarified his testimony to indicate that the assaults began sometime in June 2018. [State's Ex. 1; 19 RR 90].

None of this evidence allowed the jury to rationally conclude that the first assault occurred on or before June 28, 2018, and, instead, such a conclusion is based on mere speculation. While "[a] conclusion reached by speculation may not be completely unreasonable"—and here it is possible that the jury's speculative conclusion is correct—the evidence remains legally insufficient to support the verdict. *Id*. at 15-16.

This case is similar to *Griffith* in which this Court found the evidence legally insufficient to support a conviction for Continuous Sexual Assault of a Child because the evidence did not allow even an inference that the second assault occurred before the victim's fourteenth birthday. *Griffith*, 2019 WL 1486926 at *4. The Court's reasoning was based on the imprecision of the evidence that related to the date of the second assault. *Id*. The parties did not dispute that there was more than one assault, instead they disputed whether the evidence was sufficient to find that the second assault occurred before the victim's fourteenth birthday. *Id*. The Court of Criminal Appeals agreed that the evidence did not meet this standard because the evidence was too general. *Id*. The same problem exists here. The evidence of when the first assault occurred is too general for a rational jury to have concluded that the assault occurred on or before June 26, 2018. Thus, for the reasons explained by Judge Hervey in *Griffith*, the evidence was insufficient to find, beyond a reasonable

doubt, that the first assault occurred on or before June 26, 2018 and thus the evidence cannot support the conviction.

Therefore, the evidence was legally insufficient to support the verdict and this deficiency matters.

B. SPA's Arguments are not Persuasive

1. Investigator D. Thompson's Testimony does not "Tie the Testimony Together."

SPA contends that "Investigator Thompson affirmed that June 10 was the date his investigation revealed, and Mary's desperate urge to escape the house starting June 10 tied the testimony together." (Brief, 8-9). Curiously, SPA does not cite to the record to support this claim; but the Court of Appeals did cite to the record when it rejected this claim. *Witcher*, 2020 WL 7483953, at *2-*3. The testimony that SPA relies on to "tie[] the testimony together" is:

> Q. Okay. Let's talk a little bit about the elements of continuous sexual abuse of a child under 14 years. We don't–we don't try a lot of these cases in this county, do we?
>
> A. No, ma'am.
>
> Q. Okay. This–the period of time alleged in the indictment, the on or about date, June 10th, 2018 through July 28th, 2018. The testimony in this courtroom in front of this jury is that the abuse started in June when Dayday went to jail, okay?
>
> A. Correct.

Q. All right. In the course of your investigation, did you determine who Dayday was?

A. It was the brother.

Q. Okay.

A. Yes.

Q. And, in fact, did you confirm that Dayday went to jail and was incarcerated around that time in 2008 [*sic*.]?

A. Yes, ma'am.

Q. All right. And then the child said that the–to the medical professionals that the last assault had occurred on July 26th, give or take, 2018; is that correct?

A. That's correct.

[19 RR 89].

SPA argues that:

Mary did not say the abuse started *after* Darren went to jail, or did not start until he went to jail, or that it occurred *during a period in which* he was in jail. She said it started when he went to jail. She said it repeatedly. As evinced by her agreement that the abuse ended "after [she] told," she apparently understood the difference between something occurring *when* another thing happens and something occurring *after* another thing happens. Mary was able to communicate effectively with law enforcement, medical personnel, and a forensic interviewer. There is no reason to think she could not communicate effectively with the jury. (emphasis original).

(Brief, 9).

But this argument does not provide any indication of *when* Dayday (Darren) went to jail. Nor is there evidence that Mary tried to escape the house on June 10. *Id*.

Justice Burgess analyzed the evidence correctly when he wrote:

> . . . testimony regarding when the abuse began is sparse and ambiguous. Mary testified that it began when her brother went to jail. At trial, the state did not establish the precise date on which her brother went to jail,4 and on appeal, the state does not explain how this testimony establishes that date. And the evidence in this case only vaguely references a time span during which her brother could have gone to jail. Thompson testified that his investigation showed that Darren was arrested and incarcerated 'around' the period between June 10 and July 28, 2018. Erin agreed that Darren went to jail 'in about June of– maybe June 10th, give or take.' The words 'at some point,' 'around,' about,' 'maybe,' and 'give or take' make the date more uncertain, not less. Thus, the jury could only have speculated from this testimony that Mary's brother went to jail on June 10.

Witcher, 2020 WL 7483953 at *4.

Thus, Investigator D. Thompson's testimony did not "tie the testimony together," as SPA argued. Instead the evidence was insufficient for the jury to determine when the first assault occurred. *Id*.

2. This is a "Speculation" Case

SPA's argument concludes with the statement, "[t]here is no gap in the evidence, no extrapolation." (Brief, 11). But the statement is categorically wrong.

As in *Griffith*, there is tangential evidence that suggests that the assaults began in June, but the evidence did not establish when in June.

For reasons that are unclear, the Legislature created a criminal category based on the timeframe in which the assaults occurred not on the number of assaults. Tex. Penal Code Ann. § 21.02(b) (West 2011). While this is a curious distinction, the authority to create this distinction is solidly within the prerogative of the Legislature. *Id*. But this legislatively created distinction required the state to prove when the assaults began. As Justice Burgess and the unanimous panel found, the evidence failed. And the failure is surprising. Presumably, the state has records of when Dayday (Darren) went into jail and producing the records would have been a minimal addition to the state's case. The state, however, never produced any such records and the evidence adduced at trial did not establish (even inferentially) when Dayday (Darren) when to jail. Thus there was no evidence (even inferential or circumstantial evidence) of when the assaults started, and the evidence was deficient.

Thus this is a case about speculation and *Hooper* is the right case to resolve it.

SPA relies on *Metcalf* and *Rabb* to argue that those are the types of cases where *Hooper* applies. (Brief, 10). According to SPA, in each of these cases "there was simply insufficient evidence to support the conclusion even if the assumption was reasonable." (Brief, 10).

Rabb concerned a conviction for "tampering with physical evidence." *Rabb v. State*, 434 S.W.3d 613, 614 (Tex. Crim. App. 2014). In an arrest for shoplifting, the appellant put a baggie into his mouth. *Id*. at 615. When he refused to "spit it out," the police tased the appellant and he swallowed the bag. *Id*. The appellant told the paramedics that the baggie contained pills. *Id*. Critically, for the resolution of the case, there was further effort to retrieve the baggie or its contents. *Id*. A jury convicted the appellant, he appealed, he asserted a legal sufficiency argument, and the Amarillo Court of Appeals reversed. *Id*. at 616. SPA filed a petition for discretionary review and this Court granted it. In ruling against SPA, this Court wrote:

> In this case, the state did not present any evidence on the condition of the baggie or its contents after Appellant swallowed them, nor any evidence that demonstrated that the items had been ruined or rendered useless. In fact, there was not even an attempt made by officers or doctors to retrieve the baggie or to determine if its recovery was possible. There was, therefore, no evidence at the trial from which a fact finder could reasonably infer that the evidence had been destroyed.
>
> The state also asserts that triers of fact are free to use their common sense, common knowledge, observation, and experience to make inferences reasonably drawn from the evidence. It argues that people's life experiences would allow an inference that the baggie was destroyed in Appellant's stomach. However, while it is possible that the baggie was destroyed, it is just as possible that it was not. Swallowing items filled with drugs is a common technique used by smugglers to conceal and transport those drugs. This act clearly does not cause the destruction of the drugs, or it would be useless to the transporters.

> Therefore, without any evidence on the status of the baggie, a determination on whether it was intact or destroyed after passing through Appellant's stomach would be based purely on speculation.

Id. at 617.

This Court affirmed the Amarillo Court's opinion.

Contrary to SPA's argument, *Rabb* supports Appellant's position. *Rabb* concerned a lack of evidence and so does this case. Here, instead of not producing evidence that the bag and its contents was destroyed, the state relied on the inference that the human digestive process would "of course" destroy this evidence. *Id*. But this Court required the state to prove this element. And, here, the state argues that "of course" the first assault occurred before June 26, but, as in *Rabb*, the state provided no evidence to support that claim. Thus, this case, like *Rabb*, is a "speculation case," the evidence is insufficient, and the same result should apply.

The analysis for *Metcalf* is similar. In *Metcalf,* the state charged a mother as a party with assisting her husband to sexually assault their daughter. *Metcalf v. State*, 597 S.W.3d 847, 851 (Tex. Crim. App. 2020).

While differences exist between this case and *Metcalf*, they are both cases where the evidence was missing and did not support the verdict. Specifically, the evidence in *Metcalf* was that:

> statements that [the victim, Amber] cried out for her mother and believed her 'mother was letting it happen,' could have contributed to the belief that Metcalf may have known or suspected some untoward

> behavior on Allen's part prior to that incident, Amber testified that she did not inform Metcalf that Allen was sexually abusing her before the anal penetration alleged in the state's indictment occurred.

Id. at 860.

Judge Hervey correctly held that:

> While it is indisputable that Metcalf knew that Allen was sexually assaulting Amber when she walked into Amber's room and saw Allen with his hand on Amber's vagina a year or two after the charged offense, the evidence does not prove that Metcalf knew that Allen was sexually assaulting Amber at the time of the charged offense, and there is no other evidence showing that it was Metcalf's conscious objective or desire for Allen to sexually assault Amber, so she could not have intended to promote or assist the commission of that offense. Even after viewing the cumulative impact of all the admitted evidence in the light most favorable to the verdict, we conclude that no rational jury could have reasonably inferred that Metcalf intended to promote or assist the sexual assault of Amber.

Id. at 860-61.

Similarly, here, the evidence is insufficient to establish when the assaults began. Absent evidence of when the assaults began, the evidence was insufficient to support the verdict and Justice Burgess and the unanimous panel from the Sixth Court of Appeals reached the correct conclusion.

C. The Sixth Court of Appeals Did Not Intrude on the Jury's Role

The Sixth Circuit acted as a protector of the integrity of the judicial system and to ensure that the conviction did not conflict with Appellant's due-process rights

under the Fourteenth Amendment. *Jackson*, 443 U.S. at 314. In *Jackson*, the Supreme Court explained, "[i]n *Winship*, the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Id*. This is exactly what the Sixth Court of Appeals did and in so doing upheld the oath that the individual justices took to protect and defend the Constitution. Tex. Const. art. XVI, § 1 ("(a) All elected and appointed officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation: 'I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.'"). Tex. Const. art. XVI, § 1(a).

Thus, SPA's arguments that the Sixth Court of Appeals and Justice Burgess intruded on the jury are misplaced. Instead Justice Burgess and the Sixth Court of Appeals honored their oaths and acted courageously and with integrity when they made what was likely an internally difficult decision to reverse this verdict.

D. Salt or SALT or salt

SPA concludes with a clever rhetorical flourish about the possible different meanings of the word "salt." (Brief, 16-17). But this case is not about "cations and

anions," or about nuclear diplomacy; nor is it about ambiguity. Instead this case is about the absence of evidence. The state, presumably, has careful records of when Dayday went to jail. Producing those records likely would have resolved this issue. But the state did not produce those records. The state tried to rely on other evidence to establish the three elements, but the state's efforts failed; Justice Burgess and the Sixth Court of Appeals were right to find the evidence deficient and to reverse this verdict.

E. Conclusion

For these reasons, the evidence was legally insufficient to support the verdict and the SPA's arguments are unpersuasive. Therefore, Appellant asks this Court to affirm the Sixth Court of Appeals' opinion.

10. CONCLUSION AND PRAYER

This case falls squarely within the admonitions issued by this Court in *Hooper*. Here the evidence allows for reasonable speculation, but the evidence does not support the inference that the first assault occurred on or before June 26, 2018. Thus the evidence does not support the verdict. Appellant asks this Court to affirm the opinion from the Sixth Court of Appeals.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Rule 9.8 of the Texas Rules of Appellate Procedure because it is computer generated and does not exceed 15,000 words. Using the word count feature included with Microsoft Word, the undersigned attorney certifies that this brief contains 8,989 words. This brief also complies with the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font for the text and 12-point Times New Roman font for the footnotes.

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CERTIFICATE OF SERVICE

This is to certify that on May 25, 2021 that a true and correct copy of this Brief was served on lead counsel for all parties in accord with Rule 9.5 of the Texas Rules of Appellate Procedure. Service was accomplished through an electronic commercial delivery service as follows:

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